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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1187.

HARRY E. KALODNER, Judge of the District Court of the United States for the Eastern District of Pennsylvania,
Petitioner,

vs.

WEBSTER EISENLOHR, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT IN REPLY TO MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION.

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As pointed out in our brief in opposition to the petition for certiorari, this Court is without jurisdiction to entertain the petition because it was filed more than three months after the entry of the final decree whose review is sought.

The memorandum submitted on behalf of the Securities and Exchange Commission (hereinafter called the "Commission"), as *amicus curiae*, completely ignores the jurisdictional point. No reference is made, under the heading "jurisdiction" or elsewhere, to the date of entry of the final decree, namely, December 28, 1944. The only refer-

ence is to January 23, 1945, the date of the writ of mandamus, which was the *process* issued in *execution* of the final decree.[1]

The Commission was advised of the *Speese* suit and of the remarks of Judge Kalodner criticizing respondent's offer to its stockholders more than two years ago (R. 62a). Its legal representative, who was in court when the matter came before Judge Kalodner on May 24, 1943, was requested, by Judge Kalodner, to stay and report to the Commission. He agreed to do so (R. 72a). As a matter of fact, respondent's counsel furnished the Commission, about that time, with copies of all the documents relating to the offer and explained the entire matter to several representatives of the Commission at Philadelphia. Despite all this, the Commission has sought to take no part either in the *Speese* suit before Judge Kalodner or in the proceedings before the Court below, nor does it cite any statutory or other authority which gives it the right to be heard here. Even now, despite its full information, the Commission does not contend that there was any fraud or misconduct, or that an inquiry would reveal any circumstances which would warrant court action (see its brief, p. 9).

Nevertheless, since the Commission is an agency of the Government, we deem it appropriate to point out that its memorandum lends no support to the petition for certiorari.

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[1] It is clear, beyond dispute, that the petition was filed too late. In addition to the cases cited in respondent's brief in opposition (p. 8), see *Radford* v. *Folsom*, 131 U. S. 392 (1888).

Petitions tardily filed have been consistently denied. *Salmon* v. *U. S.*, 289 U. S. 732; *Rust Land Co.* v. *Jackson*, 250 U. S. 71, 76; *Dept. of Banking* v. *Pink*, 317 U. S. 264.

It is, of course, too late now for petitioner to obtain an extension of time in which to file his petition. *Cresswell ex rel. Di Pierro* v. *Tillinghast*, 286 U. S. 560 (1931).

The Commission first seeks to transform an ordinary stockholder's suit to procure the construction of a single provision of the charter and by-laws of a corporation into a proceeding akin to a corporate reorganization in which the Court exercises general supervision over the properties of the insolvent or bankrupt corporation. As the Commission's memorandum itself points out (p. 5), a corporate reorganization is an entirely different type of proceeding from ordinary litigation "where issues are to be determined solely upon such evidence as the contending parties choose to introduce." Since the Commission's premise is unjustified and unsound, its arguments based thereon are inapplicable.

The Commission further contends that "the agreement between the litigants which resulted in the sale of the plaintiff's securities [in the *Speese* action] was a compromise which, under Rule 23(c), the parties should have submitted to the Court for its approval".

There was no agreement between litigants in the *Speese* suit. There was merely a general offer by the defendant (respondent in this Court) to *all* its preferred stockholders to purchase their stock—an offer which was accepted by holders of 4,047 out of 5,037 shares of respondent's preferred stock.[2]

There was no settlement or compromise of the *Speese* suit. That suit was not dismissed—in fact it is still pending.[3]

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[2] It sould be noted that this offer did not result from the institution of the *Speese* suit but was the culmination of discussions initiated almost a year earlier when respondent's directors appointed a committee to consider the matter (R. 69a, 113a).

[3] Although the only issue in the case was squarely presented by the pleadings which thus permitted a prompt determination thereof, the case has not been tried or determined by the District Court in spite of the fact that it has been pending for more than two years (R. ii), and that respondent was ready to proceed with the trial a few months after issue was joined (R. 74a).

The holders of the 990 shares of preferred stock who did not accept respondent's offer were free to intervene in and to prosecute the *Speese* suit. They were formally advised of their rights in this connection (R. 5a, 35a). Two years have elapsed, but none has attempted to intervene.

Furthermore, if any stockholder who accepted the offer felt that he had been defrauded, he was free to assert his claim in a proper proceeding before a court of competent jurisdiction. No such proceeding has been commenced nor has any claim of fraud been made, even to respondent, by anyone who accepted the offer.

Rule 23(c) has never been construed to cover a situation like that presented here (see our main brief, pp. 13-14). The order of reference (R. 13a-15a) made by the District Court did not purport to be made pursuant to Rule 23(c) and did not refer to the Special Master any question as to whether the action should be compromised or dismissed.

The avowed and patent purpose of the order of reference was to initiate an investigation by the District Court, through a Special Master, to determine if persons, who were fully capable of acting for themselves, had any rights which could be asserted by litigation or otherwise. This is a far cry from the judicial functions, which, alone, under the Constitution, District Courts may exercise.

In addition to asserting that respondent's purchase of the plaintiff's stock resulted in a settlement of the *Speese* action which required court approval under Rule 23(c), the Securities and Exchange Commission asserts that "there were indications that the complainant, or his counsel [in the *Speese* action] had used the process of the court to further his own ends in violation of obligations owing to the other members of the class" and that "It was within the power * * * of the court * * * to investigate possible abuse of the court's process." In this connection the Com-

mission cites *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248, as illustrative of a court's power to deal "with fraud perpetrated on a court". But there has been no claim either by the District Judge in the *Speese* action or by any judge of the Circuit Court of Appeals in the present proceeding that any fraud upon the District Court has been committed or attempted. Judge Kalodner's extraordinary, self-prepared order of reference (R. 13a-15a) shows that it was not designed to determine whether there had been a fraud upon the District Court. On the contrary, its entire object was to determine whether or not there had been a fraud upon third parties (in connection with matters not involved in the *Speese* suit). If a fraud has been committed upon third parties, they, not the District Judge, are the ones to assert it.

Although the Commission purports to take "no position as to whether there was in fact any fraud or misconduct", it asserts that "There were *prima facie* indications of inadequacy of the disclosures made to the public members of the class", and that "The circumstances of the transaction pointed toward fraud * * *." The lack of any foundation for such statements is sufficiently demonstrated in the appendix to respondent's main brief (pp. 15-20). Here we desire only to point out that at no time has any claim of fraud or unfairness been made by anyone but Judge Kalodner. His remarks during the proceedings before him and the order of reference received considerable publicity. His words and acts and the publicity which attended them were of the kind which would be inclined to foment litigation. Notwithstanding these provocatory circumstances *not a single one of respondent's preferred stockholders has shown any interest whatever in the District Judge's inexplicable crusade against respondent.* On the

contrary, the District Judge has attempted to be a champion where he has no cause and to be a leader where he has no following.

Conclusion.

The Petition should be denied.

Dated, May 24, 1945.

Respectfully submitted,

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